UNITED STATES OF AMERICA
BEFORE THE SECRETARY OF COMMERCE

Foothill/Eastern Transportation Corridor Agency;
Board of Directors of the Foothill/Eastern Transportation Corridor Agency,

Appellants,

v.

California Coastal Commission,

Respondent State Agency.

RESPONDENT CALIFORNIA COASTAL COMMISSION'S OBJECTION AND OPPOSITION TO APPELLANTS' NOTICE OF ADDITIONAL AUTHORITY

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RESPONDENT'S OBJECTION TO APPELLANTS' NOTICE OF ADDITIONAL AUTHORITY

Respondent California Coastal Commission (Commission) objects to the unauthorized Notice of Additional Authority submitted by appellants Foothill/Eastern Transportation Corridor Agency and Board of Directors of the Foothill/Eastern Transportation Corridor Agency (TCA). TCA seeks to circumvent the page limitations and timely filing requirements established by the Secretary of Commerce in this appeal. The materials submitted by TCA were available before TCA filed its reply brief and supplemental appendix. The district court order was filed on April 25, 2008, prior to TCA's reply brief dated May 5, 2008. And the Letter from the Office of Legal Counsel, dated 1976, was available over 30 years before TCA's reply brief was filed. There is simply no excuse for submitting these materials late, along with five additional pages of argument. The Secretary should decline to file TCA's unauthorized notice of additional authority and argument.

RESPONDENT'S OPPOSITION TO APPELLANTS' NOTICE OF ADDITIONAL AUTHORITY

In the event the Secretary does file TCA's additional authority and consider the arguments submitted in connection with the additional authority, the Commission requests that the Secretary consider the following opposition to that authority. The district court order in Manchester Pacific Gateway, LLC, v. California Coastal Commission, USDC Southern District Case No. 07cv1099 JM (RBB), is neither appropriate precedential authority nor relevant here. The Manchester order is only an interlocutory order, is not a final judgment, and is not published in the official reports of the federal district court. TCA provided a LEXIS version but LEXIS publications are not official publications unless formally published in the Federal Supplement;

the decision does not appear in Westlaw and has not been formally published. It is therefore not a proper authority. Further, the Commission has filed a motion for reconsideration of the order because the order is based on serious errors of law and fact.

The decision directly contravenes the United States Supreme Court decision in California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1986). In Granite Rock, the Supreme Court expressly held that the Commission has permit jurisdiction over private activities on federal lands even if those lands are excluded from the coastal zone under the federal Coastal Zone Management Act (CZMA). The Supreme Court held that:

> Because Congress specifically disclaimed any intention to pre-empt pre-existing state authority in the CZMA, we conclude that even if all federal lands are excluded from the CZMA definition of "coastal zone," the CZMA does not automatically pre-empt all state regulation of activities on federal lands. 480 U.S. at 593 [emphasis added].

The Granite Rock case is dispositive here. In Granite Rock, the Commission asserted coastal development permit authority over private activities on federal lands. The Supreme Court held that the CZMA does not pre-empt state regulation. The Court observed that while the Property Clause of the federal Constitution gives Congress plenary power over the federal land at issue, even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law or when Congress evidences an intent to occupy a given field. Id. The Court rejected the argument that the CZMA pre-empted state regulation and applied the tradition pre-emption analysis which requires an actual conflict between state and federal law or a congressional expression of intent to pre-empt. Id. at 594. The Court found no conflict and no intent to pre-empt. Id. The Court rejected exactly the same argument that TCA makes here: that the CZMA preempts the Commission from requiring a coastal development

permit for a project by virtue of its being located on federal lands allegedly excluded from the CZMA's definition of the coastal zone. The Secretary should decline to follow an unpublished, interlocutory district court decision which directly contravenes Supreme Court precedent.

Moreover, the Manchester case is entirely distinguishable from this toll road case. In Manchester, the Navy and Manchester entered into a joint venture --- the Navy leased the Navy Broadway Complex site to Manchester.[1/] Manchester agreed to build the Navy a new office building in exchange for which Manchester obtained the right to develop the remainder of the site with hotels, office buildings and commercial retail. The purpose of the project and of the federal legislation authorizing it was for the Navy to obtain new offices at no expense to the Navy. P.L. 99-661 § 2732. Here, the purpose of the project is to build a toll road to allegedly alleviate congestion on Interstate 5; the purpose of the toll road is unrelated to the Marine Corps at Camp Pendleton.

While Congress authorized the Secretary of the Navy to grant an easement to TCA (P.L. 105-261, § 2851; CCC Supp. Appendix, Tab 5, p. 37), no such easement has been granted. Indeed, the record submitted by TCA is devoid of any evidence that the Secretary of the Navy has granted any such easement or will grant any such easement.[2/] The toll road is not a joint venture but is instead a purely non-federal activity. Moreover, the legislation authorizing the Secretary of the Navy to grant the easement was amended in 2001 to attempt to limit state

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1. Although Manchester has an exclusive lease, the Navy Broadway Complex has not been formally retroceded to the State of California, unlike the area of Camp Pendleton where TCA proposes to build its toll road. The area where TCA proposes to build its road has been retroceded to the State of California, as explained in the Commission's principal brief.

2. In its principal brief, TCA only contends that the Navy is authorized to grant it an easement, not that the Navy has done so. TCA Principal Brief, p. 7.

regulation (P.L. 107-107, § 2867; CCC Supp. Appendix Tab 6, p. 41) but, most recently, Congress removed any such limitation on the state's ability to regulate the toll road (CCC Supp. Appendix, Tab 7, p. 43). The intent of the most recent amendment was to require the toll road to follow state environmental laws. CCC Supp. Appendix, Tab 8, p. 44. Factually and legally, this case differs from Manchester.

Even if the Manchester order were relevant here, the district court recognized that regardless of whether a permit could be required, the Manchester/Navy project is subject to consistency review. Order, p. 4, fn. 2. Here, the toll road requires a permit from the Army Corps of Engineers. As such, it is a federally licensed or permitted activity and must be fully consistent with all of the requirements of California's Coastal Management Program. 16 U.S.C. § 1456(c)(3). In order to be fully consistent, the toll road must meet the very same requirements it would need to meet for a coastal development permit to issue. CA Pub. Resources Code, § 30200-30265.5 (enforceable policies of the Coastal Act), 30600 (coastal development permit required for development), 30604 (permitted development must be consistent with the policies in Chapter 3 - 30200-30265.5).

The 1976 letter from the Office of the Solicitor supports rather than undermines the Commission's position. The question presented to the Solicitor was whether the CZMA definition of "coastal zone" excluded only those lands over which the Federal Government has exclusive legislative jurisdiction or excluded all federally-owned lands used by the Federal Government for federal purposes regardless of the character of the Federal Government's jurisdiction over such lands. TCA Tab 57, p. 2. The letter concluded that the CZMA definition of the coastal zone excluded all federally-owned lands. Id. at 12. But that conclusion must be

viewed in the context of the question presented which was limited to federally-owned lands used by the Federal Government for federal purposes. The opinion expressly defines the statutory test for exclusion as discretion regarding the use of the land. Moreover, TCA's overly broad reading of that opinion is contrary to the Supreme Court decision in Granite Rock. 480 U.S. at 590-593.

CONCLUSION

For the foregoing reasons, respondent Commission requests that the Secretary either decline to file the belated notice of additional authority and unauthorized argument or decline to follow the unpublished, interlocutory and erroneous district court decision.

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Respectfully submitted,

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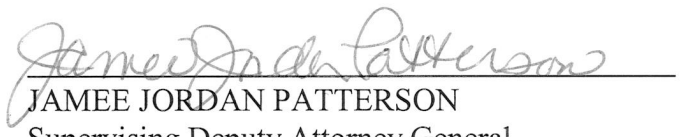

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